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Supreme Court of the United States

OCTOBER TERM, 1965

No. 786

SOCIEDAD DE MARIO MERCADO E HIJOS,
APPELLANTS,

v.

COMMONWEALTH OF PUERTO RICO, ETC.,
APPELLEE.

CONDEMNATION PROCEEDINGS

MOTION TO DISMISS

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TO THE HONORABLE COURT:

Now comes appellee, The Commonwealth of Puerto Rico, represented by the undersigned attorneys, and respectfully submits the following Motion to Dismiss pursuant to Rule 16 of the Rules of this Court.

Statement of the Facts

The facts of this case are correctly stated by appellant in his Jurisdictional Statement. Succinctly, they are as follows:

Pursuant to its powers of eminent domain, the government of the Commonwealth of Puerto Rico condemned

certain lands belonging to the appellant. At several points during the proceedings, appellant objected to the legality of the taking of his land, despite the fact that the Supreme Court of Puerto Rico, on Certiorari from a Resolution of the trial court denying an order to answer certain interrogatories (Appellant's R.A., pg. 31a), the trial court in its final judgment (Appellant's R.A. pg. 42a), and the Supreme Court again, on appeal from the final judgment (Appellant's R.A., pg. 63a) consistently refused to consider such objections for the reason that, according to local law, objections to the legality of a taking are waived when the defendant withdraws the funds deposited by the plaintiff as just compensation. After the withdrawal of the sums deposited, the case was treated by the courts as though it involved only an issue of compensation, since appellant also objected to the sufficiency of the amount deposited. Consequently, the constitutional questions presented to this Court now were never treated by the Supreme Court of Puerto Rico as properly in issue because there existed an adequate ground of local procedure to dispose of the case.

Jurisdictional Questions Presented

The questions involved at this stage of the proceedings are the following:

(1) Is the judgment appealed from based upon a non-federal ground?

(2) Is the non-federal ground adequate to support the judgment?

Argument

Question I

In its opinion on Certiorari from an incident denying the Appellant an order directing the Government to answer certain interrogatories (Appellant's R.A., pg. 31a), the Supreme Court of Puerto Rico discussed the issue raised by appellant concerning the alleged arbitrariness of government officials in selecting his land for condemnation but expressed that it was doing so solely "to clearly establish the rule which should be observed for the purpose of determining the appropriateness of this allegation and its limitations." The Court decided that it is not for it to review administrative determinations of the nature or scope of the right to be acquired by the government, the amount of land to be condemned, the necessity or the adequacy of the place in particular and that the sole concern of the courts is whether the use for which the condemned property is destined constitutes a public purpose. (Appellant's R.A., pg. 35a). In passing, the court mentioned that the condemnation in this case was for "obvious public purposes, that is, for industrial development." (Appellant's R.A., pg. 36a). Despite these statements, the Supreme Court did not treat the issues raised as properly before it. It was only intent on establishing a rule for the guidance of future cases in our jurisdiction. In appraising the situation thus presented, this Court has said that it reviews judgments, not statements in opinions.[1] Consequently, this Court should not consider these statements as the ground on which the judgment below was based. In *Black* v. *Cutter Laboratories*, supra, this Court said: ". . . we should not pass on federal questions discussed in the opinion where

[1] *Black* v. *Cutter Laboratories*, 351 U.S. 292; 76 S.Ct. 824.

it appears that the judgment rests on adequate state grounds."[2]

Question II

The other question with which this Court is faced is whether this appeal should be dismissed because the judgment appealed from is based on an adequate non-federal ground, that is, whether the ruling that Appellant waived his right to raise objections to the legality of the taking when he withdrew the amount deposited by the government as fair compensation for his lands, is a rule of fair and substantial support. If the judgment appealed from is based on a non-federal ground that has fair and substantial support[3] this court, because of a self-imposed limitation, will refuse to review the decision in the merits and will dismiss the appeal for lack of jurisdiction.

The principle that objections to the legality of the taking in eminent domain proceedings are waived if the sum deposited as fair compensation is withdrawn is an adequate ground of decision of which Appellant must have been aware for it is a procedural rule of long usage, even in the federal jurisdiction. In *Winslow* v. *Baltimore & O.R. Co.*, 208 U.S. 59, 28 S.Ct. 190, 191 this Court stated:

> "If the company was without right to take a part of the land of the plaintiffs in error, unless it took more or all, or if the purpose for which the land was sought to be taken was unlawful, the proper course would be to dismiss the petition. This is what the plaintiffs in error originally asked. But, by accepting

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[2] 76 S.Ct. at pg. 827.

[3] *Staub* v. *City of Baxley*, 355 U.S. 313; 78 S.Ct. 277; *NAACP* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163; *Wright* v. *Georgia*, 373 U.S. 284, 81 S.Ct. 1240; *NAACP* v. *Alabama*, 377 U.S. 288, 84 S.Ct. 1302; *Barr* v. *Columbia*, 378 U.S. 146, 84 S.Ct. 1734.

> the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled: . . ."[4]

The same principle is generally followed in the states of the Union.[5] In Nichol's text On Eminent Domain,[6] we find the principle recognized and commented.

> "It is undoubtedly the law that an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterwards contest the validity of the taking, either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be."

This rule is part of a broader principle to the effect that one who avails himself of the benefits waives all er-

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[4] See also *Great Falls Manuf'g Co.* v. *Garland*, 124 U.S. 581, 8 S.Ct. 631.

[5] *Georgia: Central of Georgia Ry. Co.* v. *Bibb Brick Co.*, (1919) 99 SE 126, citing *Winslow* v. *Baltimore & O.R. Co., supra; State Highway Dept. v. H-G. Hastings Co.*, (1938) 199 SE 793, 796; *Williams* v. *City of La Grange*, (1957) 99 SE 2d 617, 621, where the Court said: ". . .obviously one can not voluntarily accept the money awarded for his property and still contest the right to condemn."; *Wisconsin: Swan Boulevard Development Corp.* v. *Cybulski*, 109 NW 2d 671, 675 (1961); *Missouri: In Re Condemnation of Land, etc., in Kansas City*, (1915), 176 SW 529, 532; *New York: Weeks-Thorne Paper Co.* v. *City of Syracuse*, (1910) 124 N.Y.S. 317, 321; *Vermont: Harwood* v. *Village of West Randolph*, (1909), 72 A 1076, 1077; *Washington: James et ux.* v. *City of Seattle*, (1910), 106 P 1114, 1115. See also cases collected in Anno. 133 ALR 11, 146-148, supplemented in 93 ALR 2d 465, 520-521, and 29 LRA (N.S.) 1, 21-22.

[6] Vol. 6, 3rd. ed., § 28.321(2), pg. 419.

rors. In *Eustis* v. *Bolles*, 150 U.S. 361, 14 S.Ct. 1831, this Court considered as an adequate non-federal ground the rule employed by the Supreme Court of Massachusetts as a basis for its decision to the effect that by accepting and receiving a dividend in insolvency proceedings a creditor waived the right to object to the validity of the insolvency statutes.[7] In our own jurisdiction it has been held that a person who avails himself of an unconstitutional act cannot subsequently aver its unconstitutionality as a defense.[8]

From what has been said, it is evident that the rule of local procedure invoked by the Supreme Court of Puerto Rico as the basis of its decision is a reasonable rule of long usage, is not an "arid ritual of meaningless form", or a novel local procedure used to evade a constitutional issue.

Appellant argues that withdrawal of the funds could not estop him from litigating questions going to the legality of the taking because, in his Motion for Withdrawal, he expressly reserved to himself the right to pursue such allegations. He states, additionally, that, at any rate, since title and possession of the lands passed to the Commonwealth by court order upon the filing by the plaintiff of the petition and a motion for immediate possession and acquisition, he had already been deprived of the use and benefit of the property when he withdrew the funds.

These are arguments going to the soundness of the rule in controversy and the correctness of its application in this case. Appellant, in effect, is taking this court to revise the decision of the Supreme Court of Puerto Rico upon a question of local law, i.e., whether the rule of

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[7] See also cases collected in 29 LRA (N.S.) 1, to the effect that a right to prosecute an appeal is lost if the benefits under the decree or judgment are accepted.

[8] *People* v. *White Star Bus Line, Inc.*, 45 PRR 148, 155; *People* v. *The Fajardo Sugar Co. of P.R.*, 51 PRR 851, 861.

estoppel became inoperative when a reservation of the right to raise objections going to the legality was made or because at the time of withdrawing the deposit, appellant had been deprived of the use and benefit of the property due to the fact that title and possession of the lands had already passed to the Commonwealth. The first of the two arguments was presented to the Supreme Court in a Motion requesting reconsideration of its judgment on Certiorari from an incident in the trial court concerning interrogatories (Appellant's R.A., pg. 39a), which motion was denied by order dated May 28, 1962 (Appellant's R. A., pg. 41a). The second is presented now for the first time in these proceedings. In any event, these arguments cannot avail appellant here. This court has consistently maintained that if the non-federal ground is not without fair support or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of federal constitutional questions, a state decision will not be reviewed because it misconceives or misapplies a rule of state law. Such misconception or misapplication does not of itself violate the due process clause of the federal constitution.[9]

Even if these arguments could be considered as a claim of a federal right, they cannot be passed upon by this court since they were not asserted below as such by proper pleadings.[10]

WHEREFORE, it follows that the questions raised by appellant are not properly before this Court and, conse-

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[9] *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157; 37 S.Ct. 318.

[10] *Atlantic Coast Line R. Co.* v. *Mims*, 242 U.S. 532, 37 S.Ct. 188; *Edelman* v. *People of State of California*, 344 U.S. 357, 73 S.Ct. 293.

quently, appellee respectfully moves this Honorable Court to dismiss this appeal.

San Juan, Puerto Rico, December

(s) J. B. Fernandez Badillo
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